"Save where the contrary intention appears, the provisions of this Act shall apply to this Act and to any written law now or hereafter in force made by competent authority in Brunei, and to any instrument made or issued thereunder."

In my view, a contrary intention plainly appears from the wording of section 304 of the Penal Code. Section 39 is designed to apply to penalty provisions where no indication is given that the legislature intended that there be a specific mandatory penalty.

An example of such a provision is section 292 of the Penal Code which concludes with these words:

"Penalty, a fine of not less than $500 and not more than $5,000 and/or imprisonment for 12 months, and in the case of a second or subsequent conviction, a fine of not less than $1,000 and not more than $30,000 and/or imprisonment for 3 years."

Section 39 thus makes it clear that the two terms of imprisonment where referred to may not exceed 12 months in the first case and three years in the second.

Another example is section 16 of the Societies Act (Cap. 66) which provides for a penalty of imprisonment for three years. These are but two of many examples that could be cited of sections which do not stipulate that the penalties stated therein are mandatory. In each case, section 39 makes it plain that these penalties are but the maximum terms of imprisonment that a Court may impose for the offences to which they relate.

It is to sections such as the examples I have given that section 39 applies. Where, however, as in the case of section 304 of the Penal Code, a contrary intention appears, section 39 has no application.

Accordingly I am of the view that the second argument advanced by Mr. Sandhu must also fail and that I am obliged by section 304 to sentence the accused to life imprisonment.

Order accordingly.

Solicitors: *Sandhu & Co.*

MALAYSIAN REPORTS

WONG CHEE HONG v. CATHAY ORGANISATION (M) SDN. BHD.

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C.JJ.) January 9 & May 25, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 194 of 1986]

Labour Law – Dismissal of employee – Dismissal without just cause or excuse – Constructive dismissal – Right of employee to terminate contract of service – Demotion of employee through transfer – Industrial Relations Act 1967, s.20.

Administrative Law – Certiorari – Application to quash decision of Industrial Court – Demotion of employee without just cause or excuse – Constructive dismissal – Industrial Relations Act 1967, s.20.

The appellant had risen in the service of the respondent company to the post of Personnel and Industrial Relations Manager and had in that capacity successfully negotiated a new collective agreement with the trade union. The trouble started after he had taken steps to implement the award confirming the collective agreement. The appellant was told that he would be transferred to manage a cinema theatre belonging to the respondent. The appellant did not accept the transfer order as he regarded it as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause or excuse. The dispute was referred to the Industrial Court which gave an award in favour of the appellant holding that the appellant was constructively dismissed and awarded him compensation. The respondent company applied for *certiorari* to quash the award and this was granted in the High Court. The learned judge stated that constructive dismissal is not within the ambit of section 20(1) of the Industrial Relations Act and therefore the Industrial Court had no jurisdiction. The appellant appealed.

Held, allowing the appeal: (1) when the Industrial Court is dealing with a reference under section 20 of the Industrial Relations Act, the first thing that the court will have to do is to ask itself a question whether there was a dismissal and if so whether it was with or without just cause or excuse;

(2) the common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer;

(3) there can be no doubt that the appellant in this case was lawfully doing his duty as the Personnel and Industrial Relations Manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtained an award and implemented it. The reward for lawfully performing his duties was, however, not promotion but a demotion;

(4) what took place in this case was not a transfer but a demotion meted out without any disciplinary action taken.

The relegation of responsibility with its consequent humiliation and frustration and loss of estimation among his fellow employees made it impossible for the appellant to carry on being employed under the respondent company's organization. In other words, he had been driven out of his employment and this was therefore a dismissal;

(5) since the appellant has succeeded in showing that he was dismissed, it is for the respondent company to show that the dismissal was with a just cause or excuse. The finding of the Industrial Court pointed a strong indictment against the respondent company which it was unable to rebut. That being the case, the dismissal must be no other than that it was unjust and without excuse;

(6) the Industrial Court in coming to the conclusion that the appellant was dismissed had not misdirected itself and the court only spoke of constructive dismissal in the context of the contract test. So long as the Industrial Court directed itself properly in law as to its jurisdiction, its finding and therefore its award must stand unassailable.

Cases referred to:

(1) *Western Excavating (ECC) Ltd.* v. *Sharp* [1978] I.R.L.R. 27.
(2) *Marriott* v. *Oxford and District Co-operative Society Ltd.* [1969] 3 All E.R. 1126.
(3) *Bouzourou* v. *The Ottoman Bank* [1930] A.C. 271.
(4) *Donovan* v. *Invicta Airways Ltd.* [1970] 1 Lloyd's Rep. 486.
(5) *Cox* v. *Philips Industries Ltd.* [1976] 1 W.L.R. 638.
(6) *J.F. Bumpus* v. *Standard Life Assurance Co. Ltd.* [1974] I.R.L.R. 232.

SUPREME COURT.

K.P. Gengadharan for the appellant.

C.V. Das (*M. Nagarajah* with him) for the respondent.

Salleh Abas L.P. (delivering the judgment of the court): This is an appeal from the decision of Harun J. issuing an order of certiorari quashing an award made by the Industrial Court. The case, we were told, raises an important question of law as to whether or not the doctrine of constructive dismissal is applicable in the interpretation of section 20 of our Industrial Relations Act 1967.

Before we go into this question, here are the brief facts of the case: The appellant Wong Chee Hong was an employee of the respondent company. He entered the respondent company's service on December 31, 1968 as a junior executive assistant on a salary scale of $450 x 25 x 12 yrs = $750 (inclusive of 80% basic and 20% Cola). After a short spell of service in Ipoh, with effect from July 1, 1970, he was promoted to the post of Assistant Supervisor responsible to one Mr. Chu Chi Wang, the respondent company's manager at its Kuala Lumpur office. In that capacity, he was required to act as manager of the respondent company's Odeon theatre at Batu Pahat. Later, he was further promoted and became the Supervisor of Cinema Operations Central and East Coast States. Again, on July 1, 1980, he was further promoted to be the respondent company's Personnel and Industrial Relations Manager (P & I.R. M) for the whole of Malaysia. In that position, he was listed as one of the several Heads of Departments within the respondent company's organization, all of whom including the appellant reported directly to the Managing Director. As Personnel and Industrial Relations Manager, the appellant's duty was to negotiate on behalf of the respondent company for a new collective agreement and to implement it. Negotiations were held and these ended in the Industrial Court Award No. 69 of 1985 dated April 15, 1985.

The trouble started after the appellant had taken steps to implement the award. On May 14, 1985, he was called to the office of the Managing Director (M.D.), who curtly told him (the appellant) that he was being transferred to the Cinema Operations Department and, as such, he would be accountable to one Mr. Cheah Kong Fatt, and that his own Department (Personnel and Industrial Relations Department) would be given to his assistant. To confirm this new arrangement, the M.D. wrote a letter to the appellant to that effect dated May 14, 1985. On inquiry by the appellant as to his new job functions, the M.D. in a letter dated May 22, 1985 informed him that with effect from June 1, 1985, the appellant was seconded to manage the respondent company's cinema theatre at the Overseas Union Garden, Kuala Lumpur and to take charge of the theatre from one Mr. Kan Man Fatt. He was also told in the same letter that the terms and conditions of his service remained unchanged. On May 30, 1985, the M.D. again abruptly issued an instruction to the appellant to hand over all files, working papers and documents relating to the Personnel and Industrial Relations Department to him (M.D.) before he (the appellant) left to take over the charge of the cinema theatre at the Overseas Union Garden, Kuala Lumpur.

Unhappy at the turn of events arising out of what the appellant thought that he was merely doing his duty in negotiating a new collective agreement and taking steps to implement it, on May 31, 1985, he wrote to the M.D. stating that he was not prepared to accept the transfer order and regarded the M.D.'s instructions as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause

or excuse. The M.D. replied, denying dismissing the appellant because his terms and conditions of service remained unaltered and further because the secondment to manage a cinema theatre was "a normal part of managerial exchange of staff between the cinemas and head office so as to promote a better understanding among office staff and the operational level cinema staff."

On June 1, the appellant did not report for duty as instructed by the M.D. This prompted Mr. Cheah Kong Fatt, the Divisional Manager Cinema Operations to whom the appellant was required to report, to write two letters to the appellant, June 10 and June 29, regarding the appellant's refusal to accept the transfer order. Finally, the matter reached the Industrial Court by way of reference under section 20 of the Industrial Relations Act 1967. The court gave an award in favour of the appellant holding that the appellant was constructively dismissed and awarded him a sum of $70,633/– as compensation to be paid by the respondent company.

The application for certiorari by the respondent company was heard by Harun J. who ordered the award to be quashed because, according to a brief note recorded by the learned judge, "constructive dismissal is not within the ambit of section 20(1) of the Industrial Relations Act. Industrial Court therefore had no jurisdiction."

It is from this decision that we are now concerned in this appeal. Apart from this cryptic note, the learned judge wrote no grounds of his decision which would enlighten us on the law of the so-called constructive dismissal. This is unfortunate because we have been so much handicapped in our deliberation. We hope that judges should endeavour to write their grounds of decision and take delight in this aspect of judicial work as a matter of personal pride and satisfaction and not as a boredomsome task. Failure on the part of judges to write their grounds of decision will certainly undermine their authority to insist upon magistrates and presidents of Sessions Courts to write theirs. If the practice of not writing grounds of judgment is widespread, the system of administration of justice will tumble down.

However, in view of the importance of the question raised, we have to proceed with this appeal and spend a considerable length of time to hear both counsel taking us through a journey of technicality into English law on unfair dismissal and constructive dismissal.

The issue in this appeal is as stated earlier: whether the concept of constructive dismissal has application to the interpretation of section 20 of our Industrial Relations Act. Therefore we must know and be clear precisely in our mind what a constructive dismissal is.

In England where this expression originated, there had been a great deal of unsettled opinions amongst chairmen of industrial tribunals and also among judges who sat to hear appeals from those tribunals. According to the Court of Appeal in *Western Excavating (ECC) Ltd.* v. *Sharp,*[1] it means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. In such situations, the employee is entitled to regard himself as being dismissed and walk out of his employment.

Historically, the expression "constructive dismissal" rose into great prominence in connection with the interpretation of several pieces of labour legislation passed by the U.K. Parliament. The first was the Redundancy Payment Act 1965 which was aimed at giving relief to employees who are dismissed on account of redundancy. Such employees are entitled to a compensation known as a redundancy payment. The second legislation was the Industrial Relations Act 1971. This Act introduced a concept of unfair dismissal in that it guaranteed to an employee protection against unfair dismissal by his employer. The third legislation was the Trade Union and Labour Relations Act 1974 which is a consolidation of the previous two pieces of legislation, *i.e.* the 1965 Act and the 1971 Act. A further consolidation was effected by the Employment Protection Act 1978.

As to unfair dismissal, a provision is enacted in every one of these three pieces of legislation, *i.e.* the 1971, 1974 and 1978 Acts, to the effect that an employee has the right not to be unfairly dismissed by his employer (see section 54(1) of the 1978 Act). The Acts also define "dismissed" or "dismissal" and lay down the criteria which would constitute fairness or unfairness of a dismissal (see the 1978 Act, section 55 as to "dismissal" or "dismissed" and section 57 as to fairness of dismissal). We are here only concerned with the definition of "dismissed" or "dismissal." For this purpose, we reproduce here the relevant provision of section 55 of the 1978 Act as follows:

"Meaning of unfair dismissal

55 (1). In this Part, except as respects a case to which section 56 applies, 'dismissal' and 'dismiss' shall be construed in accordance with the following provisions of this section.

(2) Subject to subsection (3), an employee shall be treated as dismissed by his employer if, but only if, –

(a) ...

(b) ...

(c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

It is in connection with the interpretation of paragraph (c) of subsection (2) that the doctrine of "constructive dismissal" became currently used and gave rise to so much divergence of opinions until it was finally put to rest by the Court of Appeal in *Western Excavating's* case *(supra).*

The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used. It must be observed that paragraph (c) never used the words "constructive dismissal." This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought and a few decisions were made that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning M.R., with whom the other two Lord Justices in the case of *Western Excavating (supra)* agreed, reiterated an earlier decision of the Court of Appeal presided by him (see *Marriott* v. *Oxford and District Co-operative Society Ltd.*)[2] and rejected this test of unreasonableness. In no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of paragraph (c) is a contract test. In his view, the Act draws a distinction between "dismissal," which is in one section, and "unfairness", which is in another section, and moreover the paragraph is using legal connotations, such as the words "notice" and "entitled."

Thus it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier, and goes no further. Alternative expressions with the same meaning, such as "implied dismissal" or even "circumstantial dismissal", may well be coined and used. But all these could not go beyond the common law test.

Turning back to our case under appeal, it is not enough for the learned judge in the court below to say that constructive dismissal has no application to the interpretation of section 20 of the Industrial Relations Act. He must go further and say which of the two alternative views on constructive dismissal has no application and if so, why? Whilst we think that "constructive dismissal" with the unreasonableness test does not apply, it will be wrong for anyone to hold that "constructive dismissal" with the contract test does not apply. Perhaps in the context of our law, it is better that we do not use the terminology at all.

When the Industrial Court is dealing with a reference under section 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concept to the U.K. legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from paragraph (c) of section 55(2) of the U.K. Protection of Employment Act 1978. Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word "dismissal" in our section 20. We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (*See Bouzourou* v. *The*

Ottoman Bank[3] and *Donovan* v. *Invicta Airways Ltd.*[4])

In *Bouzourou's* case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan's* case, the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

Now, how do we apply the common law principle to the facts of the case under appeal. First, we have to see the facts in their proper perspective. There can be no doubt, as found by the Industrial Court, that the appellant was lawfully doing his duty as the Personel and Industrial Relations Manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtained an award, and implemented it. The reward for lawfully performing his duties was not promotion, but a demotion. From being the head of one of the respondent company's departments, he was reduced to a mere cinema manager, a position which he had held some fifteen years ago as a junior executive. No doubt his terms and conditions of service remained unaltered and the transfer was part of the terms of his employment. But with respect, we cannot accept that either of these two factors or both of them entitled the respondent company to insist upon the appellant to obey its instruction. The respondent company must have known that no man worthy of a minimum self respect would accept a transfer with a demotion in rank, stripped of all the powers he once enjoyed amongst his fellow employees. This is not a transfer but a demotion, a punishment meted out without any disciplinary action taken. What is worse is that it was inflicted not for doing a wrong act, but for doing the right thing – *i.e.* to negotiate and conclude a new collective agreement, which ended in an Industrial Court award and to implement it. The appellant may well be hasty in that he did not obtain permission from nor consult his superior officer (M.D.) before implementing the award, but this error in our view hardly justifies sending the appellant down without power and designation. One of the higher interests of law is surely that an order of the court – and this included awards of the Industrial Court – must be obeyed; otherwise the system of justice will be thrown helter-skelter with grave consequences, leading to erosion of public confidence in it. The respondent company's plea that the appellant's terms and conditions of service remained unaffected, in our view, sounds so hollow that it belies its truth and sincerity. We have perused the award of the Industrial Court and we fully concur with the comments, observation and findings made in the award regarding these two factors. Thus in our judgment the transfer, which relegated the applicant to a position of lesser responsibilities, albeit on the same terms and conditions of service, which transfer the appellant refused to accept, is a dismissal. It clearly shows that not only the respondent company was displeased with the appellant but it also exhibited the respondent company's intention not to be bound by the contract any longer. Such relegation of responsibility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the respondent company's organization. In other words, he had been driven out of his employment. This is therefore a dismissal. (See *Cox* v. *Philips Industries Ltd.*[5] and *J.F. Bumpus* v. *Standard Life Assurance Co. Ltd.*[6])

The next question is this. Is the dismissal with a just cause or excuse? Since the appellant has succeeded in showing that he was dismissed, it is for the respondent company to show that the dismissal was with a just cause or excuse. We found nothing in the finding by the Industrial Court which we could take into consideration in favour of the respondent's company. We are left with the finding of the court pointing a strong indictment against the respondent company, which it is unable to rebut. That being the case, the dismissal must be no other than that it was unjust and without excuse.

Looking at the award, it is clear to everyone that the Industrial Court in coming to the conclusion that the appellant was dismissed did not misdirect itself in law. The court only spoke of constructive dismissal in the context of the contract test. It never even made any reference to the unreasonableness test. This is made clear by the following passage at page 9 of the award:

> "Past cases of constructive dismissals dealt with by this court ... are agreed that whether or not there has been constructive dismissal is to be determined by the contract test: that is, did the employer's conduct amount to a breach of contract which entitled the employee to resign? And did the employee make up his mind and act at the

appropriate point in time soon after the conduct of which he complained had taken place."

(Otherwise he would be regarded as having elected to affirm the contract and would lose the right to repudiate the contract, *i.e.* to treat himself as discharged.)

(The words in brackets are ours).

We accept this passage to be the correct statement of the law. The questions asked by the Industrial Court in fact are similar to that part of the judgment of Lord Denning M.R. in *Western Excavation's* case where the learned Master of the Rolls set out the contract test. Only in those circumstances can an employee be held to be constructively dismissed and that is what constructive dismissal is.

The Industrial Court applied this test to the facts which it had found in the case and before coming to the conclusion that the appellant was dismissed, it examined the evidence and dealt with the issues before it very carefully and most admirably. We cannot see how its award therefore could be open for quashing by the High Court. So long as the Industrial Court directed itself properly in law as to its jurisdiction, its finding and therefore its award must stand unassailable.

For the reason stated above, we therefore allow the appeal with costs here and in the court below. The award of the Industrial Court which was quashed by the High Court is now restored. restored.

Appeal allowed.

Solicitors: *Aziz Abdullah & Co.; Shook Lin & Bok.*

ASPATRA SDN. BHD. & 21 ORS. v. BANK BUMIPUTRA MALAYSIA BHD. & ANOR.

[S.C. (Salleh Abas L.P., Seah & Mohamed Azmi S.C.JJ.) December 8 to 10, 1986 & September 25, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 212 of 1985]

Civil Procedure – Action against director of bank – Claim for return of secret profits – Order for Mareva injunction – Whether High Courts in Malaysia have jurisdiction to grant Mareva injunction – Whether affidavits made subsequent to ex parte application and granting of Mareva injunction admissible in subsequent inter partes proceedings – Whether trial judge was correct in granting Mareva injunction and Anton Piller Order – Courts of Judicature Act 1964, s.25(2) and paragraph 6 of Schedule – Specific Relief Act 1950, s.50 – R.H.C. 1980, O.29 & O.92 r.4 – Federal Constitution, art. 121.

Civil Procedure – Injunction – Whether High Courts have jurisdiction to grant Mareva injunction – Whether trial judge correct in granting Mareva injunction and Anton Piller order.

Companies and Corporations – Fraud – Elements of – Secret profits – Alter ego – Lifting of corporate veil – Whether trial judge correct.

The respondents had brought an action against Lorrain Osman, who was a director of the first respondent and the chairman of the second respondent, for the total sum of $27,625,853.06 which they claimed to be secret profits made by Lorrain without their knowledge and approval. The respondents also made an *ex parte* application for a Mareva injunction to restrain Lorrain from transferring his assets out of jurisdiction and also for an order of discovery for Lorrain to disclose the value, nature and whereabouts of all his assets. The orders which were made on January 10, 1985 could not be served on Lorrain and the learned trial judge, on the application of the respondents, extended the Mareva injunction to Lorrain's assets in 32 other banks in addition to the 6 banks cited in the earlier order and also to his shares in 104 other companies apart from Aspatra Sdn. Bhd. and the 4 companies mentioned in the original order, for the purposes of restraining Lorrain from dissipating his assets up to the amount claimed in the writ. The court also granted an Anton Piller order against Aspatra Sdn. Bhd. which was subsequently varied and extended to other companies.

Aspatra Sdn. Bhd. and the other companies affected were allowed to be joined as interveners in the Mareva proceedings to enable them to set aside the *ex parte* injunction and Anton Piller orders against them. The applications to set aside the *ex parte* orders were filed and heard in batches and eventually there were still 77 companies affected by the Mareva injunction which had not intervened. Of these 12 had been discharged from the said orders on the application of the respondents. The injunction in respect of the remaining 65 companies remained in force, but as in the case of the 27 companies which had intervened, the terms of the injunctions were varied to enable the companies to carry on with their day to day business.